Supreme Court, U.S.
FILED
OCT 31 1986
JOSEPH F. SPANIOL, CLERK

No. 86-267

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

RAVEN'S HOLLOW, LTD., AIRLIE FOUNDATION, AIRLIE TRUST AND MURDOCK HEAD,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONERS' REPLY BRIEF

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In its Memorandum in Opposition ("Mem."), respondent raises a number of novel arguments, none of which effectively refutes petitioners' contention that the decision below is squarely in conflict with decisions of other courts of appeals regarding the effect of this Court's decisions in *United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983) (*"Sells"*), and *United States* v. *Baggot*, 463 U.S. 476 (1983) (*"Baggot"*), on previously entered orders authorizing disclosure of grand jury materials pur-

suant to Fed. R. Crim. P. 6(e) ("Rule 6(e)"), and with decisions of this Court regarding the impact of an intervening change in the law on an executory order.

1. That certain of the grand jury materials at issue may have been disclosed to petitioners pursuant to the Federal Rules of Criminal Procedure in connection with petitioner Head's criminal trials and the pending tax proceedings is of scant relevance to the issues presented here. The question presented here is not whether petitioners may have access to the grand jury materials. Rather, the Petition requests the Court to determine whether grand jury materials may continue to be disclosed to the Internal Revenue Service pursuant to a Rule 6(e) order entered without the showing of "particularized need" for the materials for use "preliminarily to or in connection with a judicial proceeding" required under *Sells* and *Baggot*.

As this Court held in *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958), the mere fact that certain grand jury materials may have been disclosed to one party in a civil proceeding does not establish a "particularized need" justifying disclosure to the other party. *Id.* at 683. *See Texas v. United States Steel Corp.*, 546 F.2d 626, 629-30 (5th Cir.), *cert. denied*, 434 U.S. 889 (1977) (holding that fact that defendants in a civil action had previously received certain grand jury materials in connection with prior criminal proceedings did not give rise to particularized need on part of civil plaintiff for such materials); *Grumman Aerospace Corp. v. Titanium Metals Corp. of America*, 554 F. Supp. 771, 775 (E.D.N.Y. 1982) (holding that "[a]ccess by the government as a civil litigant to grand jury materials does not mandate disclosure of those materials to other private parties who are pursuing similar claims"). Because respondent has failed to make the showings required under *Sells* and *Baggot*, continuing disclosure of grand jury materials to the Service is barred under those decisions.

2. This case in its present posture *does* present the same question raised in *In re Grand Jury Investigation* (*John Does I-V v. United States*), 774 F.2d 34 (2d Cir. 1985), *cert. granted sub nom. United States v. John Doe, Inc. I*, 54 U.S.L.W. 3777 (U.S. May 27, 1986) (No. 85-1613) ("*John Doe, Inc. I*"): whether continued access by government personnel to grand jury materials constitutes "disclosure" requiring a Rule 6(e) order. In its argument to the contrary (Mem. at 7 n. 6), respondent conveniently ignores the fact that, as Judge Butzner recognized in dissent, the decision below rests on the very premise rejected by the court of appeals in *John Doe, Inc. I*—that because the grand jury materials in question were previously disclosed to government personnel, continuing access by such personnel to the materials does not constitute disclosure requiring a 6(e) order. Pet. App. 7a-8a. Thus, resolution by this Court of the question presented in *John Doe, Inc. I* may well determine the outcome of this case. In these circumstances, petitioners submit that this case should be set down for argument concurrently with *John Doe, Inc. I*, or, at a minimum, that the instant Petition should be held pending this Court's decision in that case.

3. Respondent, not petitioners, has distorted this Court's holding in *System Federation No. 91 v. Wright*, 364 U.S. 642 (1961). While the Court made clear in that case that a district court must have "wide discretion" in determining whether to modify an executory order in light of a change in circumstances, it recognized that "discretion is never without limits and these limits are often far clearer to the reviewing court when the new circumstances involve a change in law rather than facts." *Id.* at 648. Those limits were breached, the Court held, when the district court refused to vacate an executory order that prohibited conduct made lawful by an intervening statutory enactment. *Id.* As the Court

later recognized in *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984), *System Federation* thus stands for the proposition "that when a change in the law brought the terms of a decree into conflict with the statute pursuant to which the decree was entered, the decree *should* be modified." 467 U.S. at 576 n. 9 (emphasis added).

While a weighing of the equities is ordinarily appropriate in determining whether to modify an executory order, *System Federation* thus holds that it is *inherently* inequitable to fail to vacate an order prohibiting a party from engaging in conduct made lawful by a later-enacted pronouncement. Similarly, the principle articulated in *System Federation* and *Stotts* requires a court to vacate an executory order when a subsequent decision makes clear that the order authorizes conduct prohibited by law. The lower court's refusal to vacate its prior Rule 6(e) order is flatly inconsistent with that principle, and with *System Federation* and *Stotts*.

4. The difference between the procedural posture of this case and *In re Sells*, 719 F.2d 985 (9th Cir. 1983) (*"Sells II"*), does not vitiate the conflict between the two decisions. Both courts addressed the question whether pre-*Sells* and *Baggot* Rule 6(e) orders issued without the showings required under those decisions should be vacated so as to prohibit further disclosure of grand jury materials. On direct appeal from such an order in *Sells II*, the Ninth Circuit answered that question in the affirmative; here, on appeal from the denial of a motion to vacate the order, the court below answered it in the negative. Because, for the reasons set forth above and at pp. 13-17 of the Petition, under *System Federation* and *Stotts* the district court was *required* to grant petitioners' motion to vacate the prior Rule 6(e) order following the announcement of *Sells* and *Baggot*, there is no justification for resolving the instant case differently from *Sells II*.

5. It would not, as respondent contends, be inequitable to vacate the prior Rule 6(e) order. Doing so would simply require the Internal Revenue Service to demonstrate a "particularized need" for the grand jury materials for use "preliminarily to or in connection with a judicial proceeding" in order to obtain disclosure. Under *Sells* and *Baggot*, that is what the law requires. Moreover, as respondent points out, if the prior Rule 6(e) order is vacated, the Service may seek to establish that it is entitled to use the materials without a Rule 6(e) order, or to acquire whatever materials it may need through the investigatory tools lawfully at its disposal. Mem. at 9.

By contrast, the inequity occasioned by the decision below is considerable. Under *Sells* and *Baggot*, Rule 6(e) forbids the Service to have access to grand jury materials for use in administrative proceedings under any circumstances, and bars access to such materials for use in connection with Tax Court proceedings without a showing of "particularized need." Yet the decision below permits the Service to have such access in the petitioners' proceedings, because of the fortuity of the timing of the Rule 6(e) order. In these circumstances, plenary consideration is merited to correct this unfairness.*

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* Finally, before this Court, respondent has taken the position that the questions presented by this case occur in but a small number of cases. Intriguingly, in seeking to convince the courts below that *Sells* and *Baggot* should not be applied to bar further disclosure of grand jury materials after those decisions were announced, respondent took the view in the court of appeals that ruling in petitioners' favor would cause the courts "to be faced with a multitude of suits" presenting the question, Brief for the Appellee at 42, *United States v. (Under Seal)*, 783 F.2d 450 (4th Cir. 1986); and in the district court, respondent estimated that there were "thousands" of cases dealing with the issues raised by petitioners. Memorandum in Opposition at 45, *In re Grand Jury 78-3 (John Doe No. 218)*, Cr. No. 79-115-A (E.D. Va. Feb. 1, 1985). Petitioners submit that the Petition presents questions of considerable importance, questions which have arisen and are likely to arise

For the reasons stated above and in the Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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in other cases. *See, e.g., In re Grand Jury Proceedings (Kluger)*, 631 F. Supp. 1542 (E.D.N.Y. 1986), *remanded mem.*, No. 86-6143 (2d Cir. Sept. 26, 1986) (discussed at Pet. 12-13 n.8).